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IN THE

Supreme Court of the United States

October Term, 1964

No. 269

ANTHONY PORTELLI,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered in the above entitled case on March 11, 1965 as amended April 22, 1965, and reported at 15 N.Y. 2d 235.

A. Opinions Below

No opinions were rendered below with the exception of the opinion of the Court of Appeals of the State of New York unanimously affirming the judgment of conviction. Said opinion is appended to this petition as Appendix A, and is officially reported at 15 N.Y. 2d 235.

B. The Grounds Upon Which the Jurisdiction of This Court is Invoked

The judgment sought to be reviewed herein is the judgment of the Court of Appeals of the State of New York, made on March 11, 1965, appended hereto as Appendix B, as amended on April 22, 1965 and appended hereto as Appendix C.

Jurisdiction in this Court is invoked under Title 28, United States Code, §1257 (3) and Rule 19 subdivision 1 of the rules of this Court.

C. The Questions Presented For Review

(1) Was it prejudicial error and a deprivation of due process of law to allow the jury to consider the concededly coerced testimony of the prosecution witness Melville as to the alleged confession to him by petitioner Portelli?

(2) Was the taking of petitioner Portelli's fingerprints, after he was arrested and in custody and after the commencement of presentation of evidence against him to the grand jury, for the purpose of using said fingerprints against petitioner on his trial a deprivation of due process of law and a violation of petitioner's constitutional right to counsel and his privilege against self-incrimination?

(3) Was it a violation of due process of law to deny petitioner's application for a change of venue in the light of the extensive publicity attendant to the case?

(4) Was petitioner deprived of due process of law by the manner in which the trial jury was selected in that the Court and the prosecutor excluded jurors of the same

racial and ethnic background as petitioner and excluded persons who might have objective attitudes with respect to the imposition of the death penalty?

D. The Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the due process clause of the Fourteenth Amendment to the United States Constitution, and the Fifth and Sixth Amendments thereto. The pertinent portions thereof are set forth in Appendix D to this petition.

The statute involved is Section 165 of The New York Code of Criminal Procedure which is set forth in pertinent part in Appendix E of this petition.

E. A Concise Statement of the Case and the Material Facts Pertinent to the Consideration of the Questions Presented

Petitioner Portelli along with two co-defendants Jerome Rosenberg and Anthony Dellernia were indicted in the Supreme Court of the State of New York, Kings County for the crime of Murder in the first degree. The murders were alleged to have arisen during the course of a robbery in which two New York City Police Detectives were allegedly killed by this petitioner and his co-defendants. Trial was commenced on January 14, 1963 before the Hon. Samuel S. Leibowitz, a Justice of said Court and a special jury. The trial continued until the jury's verdict on January 29, 1963, by which verdict petitioner and Jerome Rosenberg were convicted of murder in the first degree as charged. The third co-defendant, Anthony Dellernia, received a mis-

trial prior to the case having been submitted to the jury. He was subsequently acquitted at his later trial.

On February 18, 1963, petitioner Portelli and co-petitioner Jerome Rosenberg were each sentenced to death in the electric chair.

Thereafter, and pursuant to the law of the State of New York, the conviction was reviewed directly by the Court of Appeals of the State of New York. As aforesaid, the Court of Appeals of the State of New York, unanimously affirmed the judgments of conviction of petitioner Anthony Portelli and Jerome Rosenberg. The judgment and accompanying opinion of the Court are appended hereto as aforesaid.

On April 19, 1965, the Hon. Charles S. Desmond, Chief Judge of the said Court of Appeals of the State of New York, ordered that the judgment and warrants of death be stayed pending the hearing and determination of this petition for certiorari.

On April 22, 1965, the said Court of Appeals amended its judgment to provide that the issues now being presented upon this petition were presented and necessarily passed upon with respect to questions under the Constitution of the United States—more particularly, the due process clause of the 14th amendment thereto, and that no constitutional right of petitioner's had been violated. (It might be noted at this point that the aforementioned Jerome Rosenberg who, along with this petitioner, was convicted and sentenced to death and whose simultaneous appeal was likewise affirmed by the Court of Appeals of the State of New York, is also filing with this Court a Petition for Certiorari to review the said judgment of the Court of Appeals of the State of New York).

For convenience of analysis, the specific facts as to each argument are set forth in more precise detail in the argument, *infra.*

F. The Stages of the Proceedings In Which the Issues Involved Were Raised and the Manner in Which They Were Raised

Each of the issues raised upon this petition were raised in the State courts as follows:

(1) The constitutional issue with respect to the coerced testimony of the prosecution witness Melville was raised by motion to set aside the verdict prior to sentence upon the ground that the testimony of the witness Melville should have been excluded from consideration by the jury (4262).* This constitutional issue was the main argument upon the appeal below.

(2) The issue with respect to the taking of petitioner Portelli's fingerprints for use as evidence against him at the trial was raised upon the trial by a general objection to the introduction of the evidence as to the fingerprints (1289-1290). The constitutional issue was urged upon the appeal below as a violation of the right to counsel and of the privilege against self-incrimination and also as a violation of due process of law.

(3) The issue with respect to a motion for a change of venue in light of the extensive publicity attendant to the case was timely made prior to the trial of the case. It was also renewed upon the trial of the case (216) immediately prior to the selection of the jury.

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* Numbers in parentheses refer to folios of printed Record on Appeal to the Court of Appeals.

(4) The issue with respect to the manner in which the Court and prosecution excluded jurors of certain racial and ethnic backgrounds was made during the selection of the jury. That issue was also raised upon the appeal below.

G. Argument Amplifying the Reasons Relied On For Allowance of the Writ

POINT ONE

It was prejudicial error and a violation of due process of law to allow the jury to consider the concededly coerced testimony of the witness Melville as to the alleged confession to him by petitioner Portelli.

It is our basic position herein that the use by the prosecution of testimony obtained through physical torture of the witness by police officers violates the constitutional guaranty of due process of law (U.S. Constitution, Amendment XIV). The Fourteenth Amendment governs any action of a State, "Whether through its legislature, through its Courts, or through its executive or administrative officers." (*Carter* v. *Texas,* 177 U.S. 442, 447; *Rogers* v. *Alabama,* 192 U.S. 226, 231; *Mooney* v. *Holohan,* 294 U.S. 103, 112-113).

The underlying facts are as follows:

Richard Melville was called as a witness for the prosecution (1539). He stated that he was married (1539) and had four children (1658). He had been a bookmaker (1658) and had also been convicted of receiving stolen merchandise in 1959, as a misdemeanor (1540).

On May 19, 1962, the day following the homicides, Portelli and two others came to his home (1557). A conversation took place between Portelli and one Frank Lino. Lino asked Baldy (Portelli) how he felt. Portelli replied that he "could still feel the ringing in my ears" (1559) Lino asked Portelli "why did you do it. Why did you drop the gun . . . are you crazy?" (1560) Portelli replied, "I panicked." He further stated that he took $300 from the register and Jerry (Rosenberg) took the rest (1561-1562).

MELVILLE further testified to Portelli's alleged description of how he committed the murders (1607-1609):

> "Q. I don't hear you. A. He sat down to watch television.
>
> Q. Who sat down? A. Me and Portelli.
>
> Q. In the course of watching television, was there a conversation between the two of you? A. Yes, sir.
>
> Q. Can you tell us what that talk was about? A. He was telling me—
>
> Q. Who was telling you? A. Portelli was telling me that he was outside the tobacco place—
>
> Q. Speak up louder. A. He was outside the tobacco place sitting down when two men got out of a cab and they went into the tobacco store and they came out and one of them stopped to look at him, and he said something to this other one, and they both got back in the cab, and they drove off and they made a turn, and Portelli had walked to the corner, and he looked for the cab, but the cab disappeared.
>
> So he walked back to the store, and they went in, and he was taking money out of the cash register and he heard a shot, and he saw two shadows coming in and he says that he panicked, and he drew his gun and started shooting, and that he ran to the back trying to get out, and the door was locked, and he ran

back to the front, and he dropped his gun, and he was running out yelling, 'Stick up, stick up.'

He told me that he was trying to make believe that he was a cop in case anybody was outside, and he started—he just took off.

Q. Was there any further conversation in the living room between the two of you? A. No."

MELVILLE further testified that about 10:30 (1712) that night he was forcibly taken by three detectives into custody at the police station for questioning (1654-1655, 1679). He denied knowing Portelli (1667). He was held in custody overnight although not arrested (1663). He remained in custody until late afternoon of the following day (1670). By that time he had given the police a statement similar to his testimony at the trial.

While in custody at the police station he was interrogated by eight or nine detectives (1682).

MELVILLE'S arm was twisted behind his back (1683), he was struck about the ears (1683), he was beaten in the back with a stick (1670), he was smacked in the head and back with open hand (1085, 1696). He continued to deny knowledge of the individuals involved (1693). He was moved from one room to another (1686, 1695, 1697).

Finally he was placed in a room with a bed and a table (1697). The detectives stripped him naked (1698). He lay face down on the bed (1700). He was beaten with a rubber hose and a wooden stick (1698). While he was being beaten he was questioned about Portelli. When he attempted to get up from the bed he was forced down on to it (1701). He continued to deny knowing Portelli (1702).

He was beaten on the testicles (1705). *Lighted cigarettes were applied to his back* (1716). He asked them to stop (1716). He was crying, frightened and in pain (1706). The beating while he was on the bed lasted about one hour (1704).

Finally sometime during the night (1713) he told them about Portelli coming to his house (1715). He was kept in that room all night. Different policemen came and went all night. He did not sleep that night (1712) nor was he fed (1714).

The following morning, about noon, he was taken from the police station to the District Attorney (1725), while handcuffed in a police car (1726). There he was questioned further by detectives (1728). From there he was taken to the Grand Jury. He was still frightened and in pain (1732-1733).

From that time, May 20, 1962, to the time of his testimony at the trial, January 21, 1964 (1958) a policeman had been continually in his apartment 24 hours a day. When his wife leaves the apartment to shop, a policewoman accompanies her (1734-1735). He never dicusses the case with either the policeman or the policewoman (1736). He stated that his testimony at the trial and before the Grand Jury was the truth (1750).

PORTELLI did not testify at the trial.

No testimony was offered by the prosecution to rebut Melville's testimony as to the torture described by him at the hands of the police.

The Court, in its charge to the jury, condemned the workings of the police, but nonetheless told the jury that

they could accept Melville's testimony as true even though they found it to be the product of the torture described by him. The Court, after reviewing Melville's account of Portelli's alleged statements as to how the homicides occurred (4134-4141), instructed the jury that they must first determine whether Portelli made these statements to Melville and then determine whether or not the statements amounted to a confession by Portelli to Melville (4141-4142). The Court further charged the jury (4149-4154):

> "Now what happened to Melville? He tells us that the police grabbed him at about 10:30 P.M. on May 21st, and took him in for questioning; that he was asked if he knew the defendants; if he knew Portelli, if he knew Rosenberg, if he knew Dellernia. He said, 'I don't know these people.' He said that he lied about it, that he lied to the police; that he kept his mouth shut about knowing these people, and although they gave him a unmerciful beating which would do credit, if I can call it 'credit,' to a gestapo wretch in Hitler's camps; although they gave him an unmerciful beating, he would not open up and say that he knew these people. Even when John Dellernia was on a bed in a bedroom, being 'give the works,' as they say, by the cops, when John Dellernia identified Melville, Melville refused to say that he knew John Dellernia. He stood pat; but finally he couldn't stand the pain any more. He couldn't stand the torture, and he opened up. Then the story was told.
>
> "What about Melville's beating, which he undoubtedly received at the hands of the police, which is reprehensible. I suppose, as you and I sat here in this courtroom and listened to this tale, we were nauseated; at least I was nauseated, and as Assistant District Attorney Selzer so forthrightly stated, these cops, who gave this man a beating in that station

house, they deserve the most utter condemnation on the part of every citizen in this community. This isn't Russia; this isn't Hitler's Germany; this isn't Castro's Cuba. This is America. This is a glorious country where we don't tolerate things of that sort, and I believe that the District Attorney was correct in appraising the conduct of these men in the manner that Mr. Selzer did, and in the manner that the other attorneys did too. But *what about his testimony? Is his testimony to be ruled out, to be disregarded just because the cops gave him a beating, and for no other reason?*

"*The answer to that question is no.* It would be different if a defendant were coerced, and they tried to use a confession against him. Then the law is simple. Then that statement of his would never reach the ears of a jury. But the law is different in the case of a witness, and the jury may consider the beating, and determine whether or not, in spite of the beating, he came in here and he told the truth as to what happened between him and Portelli in his house on that Sunday until Portelli allegedly left in the car to skip to Chicago.

"I said to you a moment ago, and I say this sincerely, I wouldn't convict 'a dog' on the testimony of Mr. Melville because of his background, and the kind of a man that he is, and I use the word 'man' in quotation marks. That is pretty strong language, isn't it; unless I had other evidence to bolster what he said, other evidence in which I had confidence, other evidence that I could trust."

Immediately prior to imposition of sentence, Portelli's counsel moved to set aside the verdict upon the ground, among others, that Melville's testimony should have been excluded from consideration by the jury (4262). The motion was denied (4298).

As earlier stated, it is our position that no conviction—particularly one which directs the death of the accused—ought to be allowed to stand when an integral part of the underlying evidence was the conceded result of physical torture by police officials of the witness who ultimately gave that evidence.

Apparently this Court has never passed on the point at bar. Yet while precise precedent is lacking, principle most assuredly is not. The entire history of our jurisprudence, as distilled from reported opinions, militates against condoning judgments resting upon official violence and disorder.

There are fundamental and overriding considerations which rip asunder the very underpinnings upon which this conviction now rests. We refer, of course, to the vibrant frontiers of the Due Process Clause in Federal Constitution which embodies the concept that official brutality in any form is tainted by its own self-defeating poison. As stated by Mr. Justice Warren in *Spano* v. *New York,* at 360 U.S. 315, 320-321:

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

The following year, the Supreme Court, in *Blackburn* v. *Alabama,* 361 U.S. 199, 207 (1960) said:

> "It is also established that the Fourteenth Amendment forbids 'fundamental unfairness in the use of

> evidence, whether true or false.' * * * As important as it is that persons who have committed crimes be convicted, *there are considerations which transcend the question of guilt or innocence.*" (Italics supplied.)

Earlier, in *Rochin* v. *California*, 342 U.S. 165, 72 S. Ct. 205, the Supreme Court had applied the same principles in reversing a state conviction for possession of narcotics where the evidence of possession was obtained by extracting two morphine capsules from the defendant's stomach through the forcible use of a stomach pump causing him to vomit them up. In equating this variety of coercion with coerced confessions, Mr. Justice Frankfurter, writing for the majority held at 342 U.S. 172-174:

> "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. *This is conduct that shocks the conscience.* Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. *They are methods too close to the rack and the screw to permit of constitutional differentiation.*
>
> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained. This was not true even before the series of recent cases enforced the constitutional principles that the States may not base convictions upon confessions, however

> much verified, obtained by coercion. These decisions are not arbitrary exceptions to the comprehensive right of States to fashion their own rules of evidence for criminal trials. They are not sports in our constitutional law but applications of a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. *Due process of law, as a historic and generative principle, precludes defining and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'.*" (Italics supplied). (See also, *McNabb* v. *U.S.*, 318 U.S. 332).

The cases teach that due process of law means more than the negative condemnation of evidence obtained by brute force—it includes with its protective ambit the affirmative command that law enforcement in a civilized society must itself be carried out in conformity to law. Put another way, there is no room anywhere within the scope of due process of law for a judgment of death built upon evidence obtained from tortured witnesses. These, too, are "considerations which transcend the question of guilt or innocence." (*Blackburn* v. *Alabama, supra.*)

Despite the apparent dearth of factually controlling precedent, there have been some peripheral expressions in the reported cases in direct support of our position. In 1941, Mr. Justice Frankfurter writing for the Court in *Hysler* v. *Florida*, 315 U.S. 411, was considering a petition for a writ of error coram nobis arising from a state conviction. The basis upon which relief was sought by the petitioner was that two prosecution witnesses had given false testi-

mony against him because they had been coerced and beaten. Mr. Justice Frankfurter said at 315 U.S. 413:

> "The guides for decision are clear. * * * if Florida through her responsible officials knowingly used false testimony which was extorted from a witness 'by violence and torture', one convicted may claim the protection of the Due Process Clause against a conviction based upon such testimony."

At every turn one finds opinion after opinion categorically refusing to give constitutional sanction to evidence obtained by official violence and brutality. Always the guideposts for rejection of such evidence are our national distaste for overreaching official misconduct and an acute awareness of its danger to our beloved liberties.

Mr. Justice Frankfurter, in *Malinski* v. *New York*, 324 U.S. 401,* (1944) said of official coercion at 324 U.S. 419-420:

> "The notion that we must resort to such methods in order to check crime or to convict criminals has been rejected by those who have had most to do with the criminal law."

See, also:

Lisenba v. *California*, 314 U.S. 219;
Brown v. *Mississippi*, 297 U.S. 278;
Chambers v. *Florida*, 309 U.S. 227.

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* It is interesting and pertinent to note here that Mr. Justice Rutledge in a separate opinion dissenting in part, said, *obiter*, at 324 U.S. 431-432:

> "Due Process does not permit one to be convicted upon his own coerced confession. It should not allow him to be convicted upon a confession wrung from another by coercion."

Mr. Justice Jackson, dissenting in *Ashcraft* v. *Tennessee*, 322 U.S. 143, 64 S. Ct. 921 (1944) said, "Interrogation per se is not, while violence per se is, an outlaw."

The testimony of Melville was no mere recital of some casual circumstance in the case. It was direct evidence—indeed the only evidence—of Portelli's alleged confession of guilt. If credited by the jury, it had the built-in capacity to resolve any and all reasonable doubts that might otherwise have existed in the minds of the jurors as to his guilt.

As we have demonstrated, the juridical principles underlying rejection of coerced evidence are universally applicable to all forms in which the evil may manifest itself. As such, those principles collide with a coerced witness' testimony with the same impact as upon a confession forcibly wrung from a defendant. Melville's testimony should never have been allowed to be considered by the jury.

POINT TWO

The taking of Portelli's fingerprints, after he was arrested and in custody, and after commencement of Grand Jury proceedings, for the explicit purpose of using the evidence thereof against him at the trial was a deprivation of his constitutional right to counsel and his privilege against self-incrimination.

The factual circumstances of this aspect of the case are relatively simple and undisputed.

On May 21, 1962, in the City of Chicago, a New York City detective arrested Portelli in connection with the investigation into the homicides (3094), that being the specific purpose for which he went to the Lido Motel in Chicago (3117). Portelli was returned to New York, after apparently waiving extradition (3121).

In the interim, on the afternoon of the homicide, a Detective O'Connor, assigned to the Police Laboratory, had taken

numerous fingerprint impressions at the scene of the crime, "for comparison value" (1308-1309). Included among the items examined at the scene for fingerprints were "assorted checks which were laying all over the floor" (1253-1254).

One of such checks, payable to The Boro Park Tobacco Co., was received in evidence over objection as People's Exhibit 25 (1289-1290). A photograph of the upper right hand corner of the check, showing a fingerprint, was received in evidence as People's Exhibit 47-A (1332) as was an enlargement thereof depicted on the left hand of People's Exhibit 50 (1405-1426).

On May 22, 1962, following Portelli's arrest, Detective Mandella, of the Police Bureau of Identification (1379) went to the 62nd Precinct in Brooklyn, where Portelli was already being held in custody (1393-1395). Detective Mandella had in his possession People's Exhibit 47-A showing the fingerprint on the check found at the scene of the crime (1395). This had been in his possession for several days (1446-1448). At the station house he took approximately twenty-seven prints of Portelli's fingers (1433) including eight or nine thumb prints (1479), reproduced on People's Exhibit 49 (1397).

Mandella then compared the print on Exhibit 47-A with a thumbprint of Portelli taken that day by him as shown on Exhibit 49 (1398-1399). He also subsequently examined enlargements of each print as shown on the right half of Exhibit 50 (1408, 1413). Upon the trial he testified as an expert that the fingerprint on the check, and the enlargement thereof, were identical with the prints taken by him of Portelli's thumb in the station house (1411, 1442-1444).

There can be no doubt from this record that when Portelli was arrested in Chicago on May 21st, and was in custody in the station house in Brooklyn on May 22nd, the judicial process as to him had already begun. *Indeed, on May 21st, the presentation of evidence against him to the Grand Jury had already been commenced* (1642).

Thus, when Portelli's fingerprints were taken *for the express purpose of using them against him as evidence to establish his presence at the scene of the crime,* he was not merely the focus of attention in a general investigation. He was in law and in fact the defendant arrested and accused of the murders at issue (*Escobedo* v. *Illinois,* 378 U.S. 478, 84 S. Ct. 1758).

It is our position that in the circumstances of this case, the taking of appellant's fingerprints was as much a deprivation of his constitutional right to counsel as the taking of his confession would have been (U. S. Constitution, Amendment VI, XIV, *Gideon* v. *Wainright,* 372 U.S. 335, 83 S. Ct. 792).

Our argument proceeds from two hypotheses, neither of which appear to have previously been the direct subject of any opinion in this Court, although there are opinions elsewhere in support of our position. The hypotheses propounded are (a) That the judicial process begins not only upon arraignment but at the time of arrest and formal accusation of the crime charged, such that a defendant's statement taken after arrest, but prior to actual arraignment is inadmissible in evidence, and (b) The principles applicable to post-arrest *statements* are equally applicable to post-arrest *taking of fingerprints*—at least when taken specifically for evidentiary purposes as distinguished from administrative or bail purposes.

The judicial process necessarily begins with the arrest because that is the first step by which a defendant is brought into Court. The making of an arrest *mandates* prompt delivery of the prisoner to a magistrate (New York State Code of Criminal Procedure, §165).

Assuming our position to be thus far correct, we turn to the next assumption as to whether the taking of fingerprints *explicitly for incriminating, evidentiary purposes,* is equivalent in law to the taking of a verbal statement insofar as the constitutional rights to counsel and due process of law are concerned.*

In *Bynum* v. *U.S.*, 262 F. 2d 465, a conviction for robbery was reversed where the defendant, almost immediately after arrest, was taken to police headquarters where he was booked and fingerprinted. He was thereafter indicted and upon his trial the fingerprints were given in evidence to prove that they were the same as those found at the scene of the crime.

The Court, finding that the arrest was unlawful, held that the fingerprints were, *a fortiori*, unlawfully obtained. The Court's reasoning proceeded from the holding that the taking of the accused's fingerprints for use as evidence upon the trial is subject to the same constitutional limitations as

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* By so stating, we do not overlook or abandon any argument that the constitutional privileges against self-incrimination are also infringed. We merely urge that the better reasoning proceeds from a regard to the underlying right to assistance of counsel. (See, *e.g.*, *People* v. *Hevern*, 127 Misc. 141, holding that the taking of fingerprints even for bail purposes violates the privilege against self-incrimination and due process of law. A contrary view was taken in the earlier case of *People* v. *Sallow*, 100 Misc. 447).

the taking of the accused's statement. The Court said, at pages 467 and 468-469:

> "In these situations it is deemed a matter of overriding concern that effective sanctions be imposed against illegal arrest and detention and the risks of overreaching inherent in such action. Even though highly probative and seemingly trustworthy evidence is excluded in the process, this loss is thought to be more than counterbalanced by the salutary effect of a forthright and comprehensive rule that illegal detention shall yield the prosecution no evidentiary advantage in building a case against the accused. All of this is bottomed on the Constitution itself. The Fourth Amendment makes protection of the individual against illegal seizure or arrest a constitutional imperative. In the cited cases judicial authority over the manner on which justice shall be administered is exercised in a way calculated to implement the constitutional guarantee.
>
> "True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed. Cf. United States v. Klapholz, 2 Cir., 1956, 230 F. 2d 494, certiorari denied 351 U.S. 924, 76 S. Ct. 781, 100 L. Ed. 1454. So we find in the DiRe case, the Upshaw case, the Mallory case and the case at hand a compelling common reason for reaching the same result. Therefore, we

conclude that the court below erred in admitting the fingerprints in evidence.

* * * * *

"Finally, it has been suggested that the controversy about a particular set of fingerprints here is much ado over very little because it would have been simple and proper to have taken appellant's fingerprints in court during trial in order to compare them with the prints said to have been found at the scene of the crime. It is also said the appellant's fingerprints, taken on a prior occasion, were in the possession of the Federal Bureau of Investigation and that these prints could properly have been used in this case. But this argument, like the argument of trustworthiness already discussed, simply does not meet the point. It bears repeating that the matter of primary judicial concern in all cases of this type is the imposition of effective sanctions implementing the Fourth Amendment guarantee against illegal arrest and detention. Neither the fact that the evidence obtained through such detention is itself truthworthy or the fact that equivalent evidence can conveniently be obtained in a wholly proper way militates against this overriding consideration. It is entirely irrelvant that it may be relatively easy for the government to prove guilt without using the product of illegal detention. The important thing is that those administering the criminal law understand that they must do it that way."

At bar the fact pattern is the same. The difference—such as it may be—is that in the *Bynum* case the underlying illegality was a violation of the Fourth Amendment. At bar, the underlying illegality was a violation of the Sixth Amendment. Both are, under the Fourteenth Amendment, binding upon the States (*Mapp* v. *Ohio,* 367 U.S. 643;

Gideon v. *Wainwright, supra*). Each is governed by the same principle that action by State officials, resulting in a violation of a constitutional right, precludes the use in Court of any evidence thereby obtained. This superb principle is compellingly expressed in *Mapp* v. *Ohio, supra,* at page :

> " . . . the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States, supra* at 217."

We therefore urge that once the judicial process has begun (or, as denominated in *Escobedo,* the "adversary system") the right to counsel likewise begins. Common sense and ordinary experience demonstrate overwhelmingly that that point is born at the critical moment of arrest for the purpose of prosecution. It therefore follows that any information elicited from the defendant after arrest—whether testimonial, corporeal or otherwise—in the absence of counsel is constitutionally impermissible. The taking of fingerprints *for evidentiary motives* at that stage of the judicial process, is as much the taking of a statement as eliciting a verbalized admission by the defendant that he was present at the scene of the crime.

In the final analysis, once a suspect has become the defendant under arrest, the police have no further right to seek to make him the instrument of his own prosecution. Their sole function is to retain custody of him in order that he remain amenable to the process and jurisdiction of the Court.

POINT THREE

The petitioner was deprived of a fair trial by virtue of the extensive publicity attendant to the case.

Counsel for the petitioner moved before the Appellate Division for a change of venue. The basis of the motion was the inability of the defendant to obtain a fair trial as a result of the publicity. The motion and all of the 37 supporting exhibits were introduced into evidence as Defendant's exhibit 1 (216) and appear at folio 4486 to folio 4518 with exhibits mounted subsequently. The motion was denied by the Appellate Division and renewed upon the trial and denied by the Trial Court (216).

The crime involved occurred May 18, 1962. As indicated in the affidavit in support of the motion for change of venue, the day to day events received extensive coverage. All news media devoted extensive time and space to this crime. Of course the magnitude of the crime itself drew the attention of all the news media to this occurrence and the subsequent steps to "solve" the crime (Quotations supplied). Needless to say the apprehension of possible suspects drew equal if not greater attention. The defendant's apprehension, return and subsequent court appearances was intensively covered by the press, radio and television. If defendant had retained a press agent to obtain this coverage for him, he would have had to consider the job well done.

The papers (to use the vernacular) pulled out all the stops. Thus, Portelli's return from Chicago was headlined as "Triggerman Flown In From Chicago."

The trial commenced January 14, 1963. Between the date of the occurrence and the date of trial the pot, so to speak, was kept boiling. Crime magazines which are widely distributed in the metropolitan area published articles concerning this crime and the defendant's alleged connection with it. The magazines were published in September and October of 1962.

The newspaper and magazine coverage made wide reference to the prior police records of the defendants. This defendant was referred to as an "ex-convict" and it was mentioned that he could be charged with "Parole violation".

A study of the minutes of the *voir dire* of prospective jurors, indicates that the publicity did not occur in a vacuum. One hundred six prospective jurors were individually questioned. Of this group fifty-seven were asked if they had read about the case. Thirty-five of those questioned answered in the affirmative. In addition, three had a vague recollection, two a possible recollection, one heard about it, four did not remember and one made no answer. Thus out of fifty-seven questioned only eleven indicated that they had not heard or read about the case.

Eight other prospective jurors indicated prior familiarity with the case during the course of a general questioning of a new panel of prospective jurors. Eight (8) of this group in addition to acknowledging their prior information also admitted that it influenced their judgment (page 788, *et seq.* of the *voir dire*).

A number of the prospective jurors who acknowledged that they had read about the case, in response to question-

ing by the Court and various counsel, indicated that the publicity would not influence them.

> ". . . Merely going through the form of obtaining jurors' assurances of impartiality is insufficient." (*United States ex rel. Bloeth* v. *Denno,* 313 F. 2nd 364, 372 (1963) Cert. Denied 83 S. Ct. 1112.)

The Circuit Court of Appeals in *Bloeth* (supra) went on to set forth the duty of the reviewing Court, at page 372, in the following language:

> ". . . The reviewing court must determine, from a review of the entire voir dire, whether the extent and nature of the publicity has caused such a build-up of prejudice that excluding the preconception of guilt from the deliberations would be too difficult for the jury to be honestly found impartial."

In *Irvin* v. *Dowd,* 366 U.S. 719, 81 S. Ct. 1639 (1961) the Supreme Court, set forth the standards upon which the Circuit Court relied in *Bloeth* (supra). The Court in *Irvin* (supra) discussed the history of the entire question of an impartial trial, untainted by inflammatory publicity. The Court, in *Irvin,* reviewed all of the previous tests of partiality. The conclusion they reached at 366 U.S. 724-5 has application at bar:

> " . . . But as Chief Justice Hughes observed in United States v. Wood, 299 U.S. 123, 145-146, 57 S. Ct. 177, 185, 81 L. Ed. 78: 'Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.' "

In the instant case, of course, on the application to the Appellate Division, the voir dire relied upon in the *Bloeth* case (supra) was not before the Court. Before the trial court the motion was made before the voir dire commenced. Thus under previously cited authority the issue must be examined in the light of the voir dire.

Of the fifteen jurors ultimately selected in this case (including alternates) eleven acknowledged reading about the case, one was not asked the question, three answered negatively. All who read about the case indicated, of course, that they were not influenced thereby.

> " . . . How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio months preceding by matter designed to establish the guilt of the accused." (*Irvin* v. *Dowd, supra,* at 366 U.S. 729-30.)

The People as indicated in *Bloeth, supra,* would not have been prejudiced by a trial before an impartial and unaffected jury.

We feel that the following language from *Irvin* v. *Dowd,* at 366 U.S. 727-8 sums up defendant's position herein:

> " . . . Where one's life is at stake—and accounting for the frailties of human nature—we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards."

POINT FOUR

Petitioner hereby adopts the argument advanced by petitioner Rosenberg with respect to the conduct of the Court during the selection of the jury.

Petitioner further adopts any and all other arguments advanced by petitioner Rosenberg in his petition in so far as same may be applicable to petitioner Portelli.

CONCLUSION

The petition for certiorari herein should be granted.

Dated: Brooklyn, New York
June, 1965

Respectfully submitted,

EVSEROFF, NEWMAN & SONENSHINE
Attorneys for Petitioner Portelli

WILLIAM SONENSHINE, ESQ.
Of Counsel.

APPENDIX A

Opinion of the Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, *v.* ANTHONY PORTELLI and JEROME ROSENBERG, Appellants.
Decided March 11, 1965.

Per Curiam. The proof adduced upon the trial is more than sufficient to support the jury's verdict that the defendants are guilty of felony murder and, since we find no errors of law, we would have no occasion to write were it not for the testimony of police brutality which the record before us contains.

On May 18, 1962 two police officers, Detectives Luke Fallon and John Finnegan, were shot and killed in Brooklyn during the course of a holdup when they sought to apprehend the robbers. Upon the trial, held in January of 1963, one of the principal witnesses against the defendant Portelli was a small-time criminal by the name of Richard Melville. Called by the People, he testified that the defendant Portelli came to his home (with two other men) on May 20 and completely implicated himself in the homicides, describing how he participated in the robbery, how he shot the police officers and how he managed to get away. On cross-examination, Melville stated that later the same day several detectives took him to a police station for questioning and that, although he first denied knowing Portelli or anything about the crime, he finally told the police the story which he gave in court. But he declared that he did so only after he had been held in custody overnight and severely beaten and tortured and that he would not have talked to the police had they not coerced him in this manner.

However, he insisted from the witness stand that the pretrial statement which he made to the police, as well as his testimony, implicating Portelli was completely true.

It is the defendant's contention that the witness' testimony shoud have been stricken once it appeared that his statement, although given some eight months before the trial, had been coerced by the police.

Although we deprecate official lawlessness with all the emphasis at our command, we do not believe that such conduct warrants a holding that Melville's testimony should have been stricken and excluded from the record. Testimony given from the witness stand by a witness who was, some eight months earlier, compelled by police brutality to give a statement implicating a defendant stands on a footing very different from an out-of-court confession coerced from a defendant and sought to be used against him on the trial. While the latter will be excluded as a matter of law, the testimony of a witness who, although previously forced to make a pretrial statement, asserts that his testimony at the trial is truthful is for the consideration and appraisal of the jury. (See 3 Wigmore, Evidence [3d ed., 1940], § 815, pp. 230-231.) The requirements of law are met if the fact of such earlier coercion or other official lawlessness is disclosed to the jurors so that they may pass upon the witness' veracity and credibility and determine whether the testimony given in open court is truthful and worthy of consideration.

In reaching the conclusion we do, we cannot condemn too strongly the shocking and reprehensible conduct on the part of the police about which Melville testified and we simply note that an appropriate forum is available for these charges of misconduct.

The judgments of conviction should be affirmed.

Chief Judge DESMOND and Judges DYE, FULD, VAN VOORHIS, BURKE, SCILEPPI and BERGAN concur.

Judgments of conviction affirmed.

APPENDIX B

Judgment of the Court of Appeals of the State of New York

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 11th day of March in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

THE HON. CHARLES S. DESMOND,

Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR March 11, 1965.

Filed Mar 26 1965

Sup. Ct. No. 459

The People &c.,

Respondent,

vs.

Anthony Portelli and Jerome Rosenberg,

Appellants.

Appendix B—Judgment of the Court of Appeals of the State of New York

Be it Remembered, That on the 26th day of December in the year of our Lord one thousand nine hundred and sixty-three, Anthony Portelli and Jerome Rosenberg, the appellants in this action, came here unto the Court of Appeals, by Evseroff, Newman and Sonenshine and Albert C. Aronne, and Maurice Edelbaum, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgments of conviction of the Supreme Court, Kings County. And The People of The State of New York, the respondent in said action, afterward appeared in said Court of Appeals by Edward S. Silver, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. William Sonenshine, of counsel for the appellant Portelli, and by Mr. Maurice Edelbaum, of counsel for the appellant Rosenberg, and by Mr. Aaron Nussbaum, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgments of conviction of the Supreme Court, Kings County, appealed from in this action, be and are hereby in all things Affirmed. And thereafter a motion to amend the remittitur having been granted this remittitur is hereby amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed a question under the Constitution of the United States, viz.: Whether the rights of the appellants to due process of law under the Fourteenth Amendment were violated. Appellants contended that their rights were violated (1) by the admission into evidence of the testimony of the witness

Richard Melville [see 15 N Y 2d 235] and (2) by other errors in the conduct and rulings at the trial. The Court of Appeals held that no constitutional rights of appellants had been violated.

And it was also further ordered, that the record aforesaid, and the proceedings thereon in this Court, be remitted to the said Supreme Court.

THEREFORE, it is considered that the said original judgments of conviction be and are hereby in all things AFFIRMED as aforesaid, and stand in full force, strength and effect.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court, Kings County, before the Justices thereof, according to the form of the statute in such case made and provided.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

Court of Appeals, Clerk's Office,
Albany, March 11, 1965.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL)

RAYMOND J. CANNON
Clerk

APPENDIX C

Order Amending Remittitur of the Court of Appeals of the State of New York

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Twenty-second day of April 1965.

Present,

HON. CHARLES S. DESMOND,

Chief Judge, presiding.

Mo. No. 399

The People &c.,

Respondent,

VS.

Anthony Portelli and Jerome Rosenberg,

Appellants.

Motions to amend the remittitur in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motions be and the same hereby are granted, the return of the remittitur requested and,

when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz.: Whether the rights of the appellants to due process of law under the Fourteenth Amendment were violated. Appellants contended that their rights were violated (1) by the admission into evidence of the testimony of the witness Richard Melville [see 15 NY 2d 235] and (2) by other errors in the conduct of and rulings at the trial. The Court of Appeals held that no constitutional rights of appellants had been violated.

And the Supreme Court, Kings County, hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

Geabon Kimball
Deputy Clerk

APPENDIX D

Constitutional Provisions Involved

Fifth Amendment to the United States Constitution:

> "No person * * * shall be compelled in any criminal case to be a witness against himself. * * * "

Sixth Amendment to the United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense."

Fourteenth Amendment to the United States Constitution:

> "Section 1. * * * nor shall any state deprive any person of life, liberty, or property, without due process of law.* * * "

APPENDIX E

Statutes of the State of New York

Code of Criminal Procedure:

> "§ 165. Defendant upon arrest, to be taken before magistrate. The defendant must in all cases be taken before the magistrate without unnecessary delay.* * *"